IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. , ORIGINAL.

EX PARTE JESSE W. UPPERCU, PETITIONER.

Motion for Leave to File Petition for Writ of Mandmus.

The petitioner in the above entitled matter respectfully asks the Court for leave to file the petition presented herewith, wherein it asks for a writ of mandamus directed to the Honorable Frederic Dodge, directing him to vacate a certain order made by him sealing the depositions and impounding the exhibits in the case of the United States against the Dwight Manufacturing Company, made in the United States District Court for the District of Massachusetts on June 22, 1914, or in the alternative, directing the Judges of the United States District Court for the District of Massachusetts and the Clerk of said Court to give access to the depositions and exhibits in that case to the petitioner with leave to copy the same and to have copies thereof exemplified.

Dated, September 13th, 1915.

JESSE W. UPPERCU,
Petitioner,

ALVIN CUSHING CASS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. , ORIGINAL.

EX PARTE JESSE W. UPPERCU, PETITIONER.

Petition for Writ of Mandamus and Rule.

TO THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of JESSE W. UPPERCU respectfully shows:

I: Your petitioner is an attorney and counsellor at law, admitted for the past twenty-five years to practice in the State and Federal Courts in the City of New York.

II: That the United States in 1911 brought an action against the Dwight Manufacturing Company, a corporation, in the United States District Court for the District of Massachusetts, to recover penalties for violations of the Alien Contract Labor Law. The Government was therein represented by the United States Attorney at Boston, and one William H. Garland, an Assistant United States Attorney, was actively in charge. The suit was based on Sections 4 and 5 of the Immigration Act of February 20, 1907, reading as follows:

> "SEC. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation in any manner whatsoever, to prepay the

> transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act.
>
> SEC. 5. That for every violation of any of the provisions of section four of this Act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the Courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

This case was compromised and settled in June, 1914, by the payment by the said defendant, Dwight Manufacturing Company, to the United States of the sum of fifty thousand ($50,000.00) dollars. That on June 22, 1914, when the case was formally discontinued, the following order was made by the United States Judge Hon. Frederic Dodge, and entered upon the records of the Clerk of the Court:

> "It is hereby ordered, both parties consenting that all depositions herein be sealed by the clerk and retained in the files of his office subject to the right of either party to inspect the same, and that all exhibits in this case be im-

pounded with the clerk, subject to the same right of either party to inspect them."

III. That among the papers so sealed was the deposition of one Emmanuel M. Pachinakis. In that deposition Pachinakis testified on the direct-examination of Assistant United States Attorney Garland that the Dwight Manufacturing Company, acting by and through him, committed many violations of the Alien Contract Labor Law. On cross-examination by counsel for the Dwight Manufacturing Company he swore that he had no interest whatsoever in that litigation in which he was testifying, instituted by the Government to recover penalties, nor in the moneys which might be recovered therein, nor was he financially interested in the result, directly or indirectly.

IV. Your petitioner was the informer upon whose information such action was prosecuted and recovery had. That your petitioner acted under previous agreement with the Secretary of Commerce and Labor, under the terms of which the Department agreed, if the Government was successful in the suit, to submit to Congress an estimate and recommend the appropriation of a sum equalling one-half of the total fine or fines assessed against the prosecuted Company for the benefit of your petitioner. That letter in full reads as follows:

"DEPARTMENT OF COMMERCE AND LABOR,

BUREAU OF
IMMIGRATION AND NATURALIZATION.

No. 53337/27

WASHINGTON, December 16, 1911.

JESSE W. UPPERCU, Esq.,
135 Broadway,
New York, N. Y.

SIR:

The Department has under advisement the proposition submitted by you for placing at the

disposal of the Government the information in your possession regarding alleged violations of the alien contract labor law by the Dwight Manufacturing Company, of Chicopee, Mass., and Alabama City, Ala., and has decided to accept such proposition, as follows:

In the event of the final successful outcome of any civil prosecution which may be instituted against the Dwight Manufacturing Company, upon the basis of the evidence furnished by you, the Department will submit an estimate and recommend the appropriation for your benefit of a sum equaling one-half of the total fine or fines assessed by the court against the prosecuted company, such payment to be made in accordance with the terms of Section one of the Act approved October 19, 1888 (25 Stat., 566).

Respectfully,

(signed) CHARLES NAGEL,
Secretary."

FSL.

V. That following such settlement, by appropriation of Congress, the Government of the United States, in conformity with the preceding letter, paid to your petitioner on or about August 6, 1914, the sum of Twenty-five thousand ($25,000.00) dollars.

VI. That your petitioner is now being sued in two actions in the Supreme Court of the State of New York, County of Rockland, brought through one Henry C. Quinby, an attorney of New York City, and in both of these actions the deposition of said Pachinakis and the other records in the aforesaid case of United States *vs.* Dwight Manufacturing Company are material and necessary in aid of your petitioner's defense. Access to these records and the obtaining of copies have been refused by the Clerk of the Court because of said ensealing order of June 22, 1914, and formal application by motion to United States District Judge, Hon. Frederic Dodge, was orally denied and cognizance refused

because your petitioner had no standing in that case (United States, plaintiff, against the Dwight Manufacturing Company, defendant) upon which to apply for a *vacatur* of the ensealing order of June 22, 1914. The following are the facts showing the materiality and necessity of those records for petitioner's use in the court proceedings pending in the State Court in New York, and petitioner's efforts to obtain access thereto.

VII. In one of those two actions, brought by Henry C. Quinby as attorney, Emmanuel M. Pachinakis sues to recover from your petitioner forty-five per cent. of the said sum of $25,000.00 so paid to your petitioner by the United States Government, upon allegations that those moneys belonged to and were his property and have been converted by petitioner (the balance he is willing to allow to petitioner for services and expenses). Annexed hereto and marked Exhibit "A" is a copy of the complaint in that action. Your petitioner is contesting said suit and denies all right, title and interest of Pachinakis, in or to those moneys, and as evidence in his defense, to contradict and impeach the present claim of Pachinakis, your petitioner needs an exemplified copy of the testimony of said Emmanuel M. Pachinakis taken in the action of the United States against Dwight Manufacturing Company. From such testimony your petitioner will be able to show:

(1) That Pachinakis has testified under oath at length that he has no interest or right in or expectation to those moneys.

(2) That Pachinakis was the principal violator of the law and that his present claim to those moneys is an attempt to profit from his own wrong and void as against public policy.

VIII. Your petitioner in the second Henry C. Quinby suit referred to, is being simultaneously sued

by an employe of said Henry C. Quinby, on an assigned claim (with others) of William H. Garland, the previously mentioned Assistant United States Attorney who officially prosecuted the said claim against the Dwight Manufacturing Company. The nominal plaintiff is actually prosecuting the claim for the benefit of William H. Garland and so alleges in the Bill of Particulars served in the action. This suit is brought to recover $3,750.00 for those same professional services rendered the Government. Garland was a salaried Assistant United States Attorney from and before the beginning of the Government's suit against the Dwight Manufacturing Company in December, 1911, until January, 1914, when he resigned as Assistant United States Attorney. He was thereupon retained by the Government and from January, 1914, until the conclusion of that litigation in June, 1914, acted therein as special counsel for the Government. For both of said services said Garland was fully paid by the Government, as I believe. A copy of the Garland cause of action in the said suit now pending against your petitioner is hereto annexed and marked Exhibit "B".

IX. Your petitioner rendered active, continuous and successful service from December, 1911, to June, 1914, to the United States Government under an agreement for contingent remuneration, in the prosecution of the Government's claim for penalties against the Dwight Manufucturing Company. Your petitioner is now being sued for more than one-half of those moneys by the simultaneous, jointly conducted suits of William H. Garland, the former United States Assistant Attorney in charge, and Emanuel M. Pachinakis, the violator of the law who turned State's evidence,—and access to the public records and papers of the United States District Court of Massachusetts to disprove these claims, is denied him. In the Garland claim

more particularly your petitioner needs access to th exhibits, depositions and papers on file and copie thereof to show:

(1) That no services were rendered to your peti tioner by said Garland, but solely to th United States Government.

(2) That his claim for additional compensation t that given by the Government is void a against public policy, and

(3) That the claim, amounting to one and one half years' salary, for work paid for by th Government is exorbitant, as well as unjust

X. Your petitioner considers that he has state the salient facts, but believes that he should presen additional facts to this Honorable Court.

During the two years and a half that the Unite States against Dwight litigation continued, you petitioner devoted much time and attention to as sisting the Government, including such work a correcting the Government's declaration and such item as the advancement of funds at the request o Assistant United States Attorney Garland to sen Pachinakis to Smyrna, Asia Minor, to procure addi tional evidence for the Government, for which ex penditure your petitioner was thereafter reimburse by the Government. Your petitioner was kept in formed of every step taken in that litigation, an advised said Garland from time to time. Your pe titioner annexes as Exhibits "C", "D" and "E" copies of three letters written by said Garland a examples indicative of the close relations existing with your petitioner. The last letter dated Jun 29, 1914, Exhibit "E", which your petitione quotes, was written to your petitioner after th conclusion of the Dwight suit, when your peti tioner was in Washington seeking the passage o an Act of Congress awarding payment to petitione by the Government in pursuance of the letter o Secretary Nagel of June 16, 1914.

It clearly indicates Garland's then disbelief in any claim by Pachinakis:

> "I hope you will succeed in getting your bill through at this session. If you don't I fear you will have a lot of bother with L. (another claimant) and P. (Pachinakis)."

On July 18, Garland wrote petitioner:

> "I suspected from your silence that you were having your hands full with Lilienstern or some other would be claimant."

XI. Upon payment to your petitioner of $25,000., by the Government, Garland made a mesalliance with Pachinakis to jointly mulct your petitioner. Henry C. Quinby, whom your petitioner has referred to as the attorney who has instituted and is now prosecuting the present Garland and Pachinakis suits against petitioner, is Garland's personal attorney and Pachinakis retained him to sue your petitioner only upon the advice and at the suggestion and upon the arrangement of said Garland, as two attorneys familiar with the facts, have stated. Said Pachinakis has had the benefits not only of the services of said Quinby, but of his associate, counsel of ability and usually expensive; he has conducted substantial litigation, including an appeal to an Appellate Court, involving considerable printing expenses, and has, in those proceedings, sworn that he was destitute. He failed to pay $50 costs taxed against him in his first proceeding, but in his second, the present suit, he procured the filing of an undertaking for security for costs by a surety company and your petitioner has good reason to believe said Quinby has indemnified the surety company against loss.

Pachinakis, through Quinby, first unsuccessfully brought a summary application in January, 1915, in the Supreme Court in New York State, alleging that your petitioner was his attorney, and therein

sought a peremptory Court order requiring your petitioner under penalty of imprisonment and disbarment to turn over all of said moneys ($25,000) to him (Pachinakis) less a possible fee or disbursements. Throughout that litigation Garland made no effort to present his own claim, so that it is manifest that the first venture was for the joint account of the allies.

XII. In opposition to that application, petitioner went to Boston with New York counsel and employed counsel in Boston and endeavored to procure copies of the contradicting statements of said Pachinakis contained in the sealed deposition in the United States District Court Clerk's office. An application at the office of the United States Attorney at Boston was referred to said Garland as the former Assistant Attorney last in charge of the Dwight case, who promptly advised against the disclosure of the papers, and stated to your petitioner's counsel that Pachinakis' claim was just. He admitted that he had been in written and oral conference with Pachinakis. He did not disclose his relations with Pachinakis nor his own undoubted financial interest in the Pachinakis litigation nor betray the fact that it was his own Garland's) personal counsel who was prosecuting the Pachinakis claim.

My counsel went to the stenographer who took the deposition to see if the original stenographic notes were available in the event that consent of counsel and of the Court could be obtained to the transcribing of a new copy; he was met with the information that Garland had notified the stenographer that if he gave information he would be guilty of a contempt of Court, and that further, that said stenographic notes were the property of said Garland, although said Garland had resigned from the United States Attorney's office more than a year previous thereto. The recommendation of said Gar-

land to the United States Attorney, the present incumbent, was rejected (and had been rejected previous to his communications to said stenographer) and the present United States Attorney endeavored to assist your petitioner in getting such records, and did himself make a formal motion befo said Judge, Hon. Frederic Dodge, to vacate such ensealing order made during Garland's earlier tenure of office, and when that motion was denied took an appeal to the Circuit Court of Appeals, which appeal, petitioner is informed, is now pending.

XIII. Your petitioner respectfully submits that the sealing of these records, in part at least through the action of said Garland, the serious endeavor to prevent their disclosure to further the joint pecuniary interests of a former assistant United States Attorney and a confessed violator of the law, the denial of the application by the United States District Judge; while manifestly important for the successful prosecution of the Garland and Pachinakis claims, is without warrant or authority of law, is against public policy, is in violation of the rule that court proceedings and records are public documents when free from indecency, and is in subversion of the rights of those who have a legitimate interest in filed testimony and papers.

XIV. Finally, your petitioner avers that not only is the claim of said Garland without foundation, but that he has been overpaid for all work done. Your petitioner made no promise to said Garland for compensation for work he did as a regular Assistant United States Attorney, to wit, between December, 1911 and January, 1914. When Garland resigned as Assistant United States Attorney he told your petitioner that the firm of Tyler, Corneau & Eames, by whom he was employed in Boston, would not permit him to act as special United States Counsel in the Dwight matter for the compensation

which the Department of Justice was authorized to pay, and he told your petitioner that he was arranging, and afterwards said that he had arranged, with the Department of Justice to permit your petitioner to pay his employers for his services an additional compensation. Relying upon his assertions that the Department of Justice was cognizant of the facts and approved, your petitioner agreed to pay to his employers, Tyler, Corneau & Eames, additional fees for services in the Dwight case to cover the period after the resignation of Garland, and while he was acting as Special Counsel to the Government. Your petitioner did thereafter pay such bill of Tyler, Corneau & Eames, amounting to $766.66 (the Government paying $708.34) and now holds receipt in complete acquittance; and Garland's complaint, Exhibit "B" admits such payment. Your petitioner would not have made such arrangement nor paid such monies except upon the belief that the Department of Justice was fully cognizant of the facts and had consented. That said Garland represented that he was fairly advising the Department is evidenced from his letter to me of January 7, 1914, which in part reads as follows:

> "I have discussed with the firm (Tyler, Corneau & Eames) Mr. Wallace's (Assistant United States Attorney General Wallace) suggestions as to the terms of my employment as special counsel for the Government in the Dwight case. They are willing I should undertake the work at $50.00 per day for trials and such other rate *per diem* for preparation as I may be able to agree on. I am writing to Mr. Wallace about the matter today."

And on June 29, just before your petitioner paid his employers he wrote:

> "I wrote the Attorney General today at his request giving him a statement in detail of my services as Special Assistant in the Dwight case

in order that he may fix my compensation. When that has been done we shall be able to figure on your share."

I have been subsequently advised that said Garland did not advise the Department of Justice of the arrangement made between his employer's firm and myself for extra compensation, and that the Department of Justice would not have approved such agreement. At the conclusion of the Dwight case, your petitioner did, but only from a feeling of generosity, send $500.00 to said Garland as a present, and not otherwise. This was answered, but without return of the moneys, by the suits of Pachinakis and Garland and the successful suppression of the impeaching Court records.

XV. Your petitioner alleges that he is without any adequate remedy other than a writ of mandamus.

Your petitioner believes that his right to the use of the court records is established, not only in principle, but by such authorities as, Miller *vs.* Moise, 168 Fed. Rep. 940; Sloan-Filter Co. *vs.* El Paso Reduction Co., 117 Fed. Rep. 504; Boylan *vs.* Warren, 18 Pac. 174.

Your petitioner further believes that his application for a writ of mandamus is supported by many authorities, among which your petitioner recites: *In Re* Winn, 213 U. S. 458; *In Re* Pollitz, 206 U. S. 331; *In Re* Grossmayer, 177 U. S. 48; *In Re* Hohorst, 150 U. S. 653, and *Ex Parte* Glaser, Supreme Court, April Term, 1905.

WHEREFORE, your petitioner prays that this Honorable Court will issue a writ of mandamus directed to the Honorable Frederic Dodge, Judge of the District Court of the United States for the District of Massachusetts, to vacate the order made by him on June 22, 1914, sealing the depositions in the case of the United States against the Dwight Manufactur-

ing Company and impounding the exhibits, or in the alternative, directing the Judges of the District Court of the United States for the District of Massachusetts, and the Clerk of said Court to grant access to such depositions and exhibits and all filed papers and records in said case, with leave to copy same and to have exemplified copies taken thereof, and your petitioner will ever pray.

Dated, September 13th, 1915.

JESSE W. UPPERCU,
Petitioner.

ALVIN CUSHING CASS,
Attorney for Petitioner.

City, County and State of New York, ss.:

JESSE W. UPPERCU, being duly sworn, deposes and says:—

I am the petitioner herein. The foregoing petition is true in point of fact.

JESSE W. UPPERCU.

Sworn and subscribed to before me, a Notary Public in and for the City, County and State of New York, this 13th day of September, 1915.

MICHAEL H. MARKS,
Notary Public,
New York County.

City, County and State of New York, ss.:

ALVIN C. CASS, being duly sworn, deposes and says: I am an attorney and counsellor at law, practicing in the local State and Federal courts and a member of the bar of this Court. I am the counsellor who argued the motion before Hon. Frederic C. Dodge, on behalf of Jesse W. Uppercu, to vacate the ensealing order of June 22, 1914. Said application was denied by Judge Frederic C. Dodge, upon the ground that the said petitioner had no standing

in court. I personally am one of the attorneys who made application to the United States District Court and am one of the attorneys who spoke with the notary, Hamlin, and to whom the information concerning Garland's activity in keeping the depositions suppressed was disclosed.

I have read the foregoing petition and the same is true in its recitals of these matters.

ALVIN C. CASS.

Sworn to before me this 13th day of September, 1915.

MICHAEL H. MARKS,
Notary Public,
New York County.

Exhibit A.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ROCKLAND.

EMMANUEL M. PACHINAKIS,
Plaintiff,

AGAINST

JESSE W. UPPERCU,
Defendant.

The plaintiff above-named, by HENRY C. QUINBY his attorney, for his complaint, respectfully alleges:

FIRST: That at all the times hereinafter mentioned, the defendant Jesse W. Uppercu was, and is, an attorney at law, duly licensed to practice in the courts of the State of New York.

SECOND: That from and including the year 1910, down to about the month of May, 1914, the said defendant maintained an office for the practice of law in the Borough of Manhattan, City of New York.

THIRD: That prior to the 30th day of March, 1911, plaintiff was the owner of and had in his possession or under his control, all papers, documents, memoranda, cipher codes, cables and other data necessary and essential to establish that the Dwight Manufacturing Company of Chicopee, Mass., had violated the statute of the United States known as the Alien Contract Labor Law, and that said Dwight Manufacturing Company was liable to pay a fine of one thousand dollars for each and every violation of said law that might be proved against the said Company, which said fine might be recovered in a civil action brought by the United States, or by any person as informant, said law being known as the "Emigration Act of February 20, 1907."

FOURTH: Section 5 of said Immigration Act of 1907, provides:

> "*Penalty for violation of provisions.* In every violation of any of the provisions of section four of this Act, the person, partnership, company or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offence the sum of one thousand dollars WHICH MAY BE SUED FOR AND RECOVERED BY THE UNITED STATES, OR BY ANY PERSON WHO SHALL FIRST BRING HIS ACTION THEREFOR IN HIS OWN NAME, AND FOR HIS OWN BENEFIT, INCLUDING ANY SUCH ALIEN THUS PROMISED LABOR OR SERVICES OF ANY KIND AS AFORESAID, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus prom-

ised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

That the said Act further provided:

"*Payment to informer of share of penalty for violation of contract labor law.* That the Act approved February 26, 1885, entitled 'An Act to prohibit the importation and Migration of Foreigners and Aliens under Contract or Agreement to perform labor in the United States, its Territories and the District of Columbia' be and the same is hereby amended so as to authorize the Secretary of (Commerce and) Labor to pay to an informer who furnishes original information that the law has been violated such share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per centum, when it appears that the recovery was had in consequence of the information thus furnished."

FIFTH: That the plaintiff desiring to lay the information in his possession before the proper authorities in order that proceedings might be brought either in the name of the United States or any other person to recover the said fines for said violations and to receive such share thereof for such services as might be agreed upon with the Government of the United States, for the benefit of plaintiff, consulted and conferred with the defendant Jesse W. Uppercu, at his office in the City of New York, who offered to take up the prosecution and presentation of the said matter for the plaintiff, shortly prior to the 30th day of March, 1910.

SIXTH: That it was agreed between the plaintiff and defendant that the defendant should undertake the prosecution of said claims, or the presentation thereof in such manner as he thought best, in order to recover the said penalties, and to make the best arrangement with the Government of the United

States for the payment of such amount, not exceeding 50% thereof, as might be recovered for such violations, to the plaintiff herein; and it was expressly agreed between the plaintiff and defendant that in consideration of such services to be rendered by the defendant to this plaintiff in connection therewith, the defendant should retain a sum equal to 55% of any amount which should be paid to said plaintiff thereunder, and that plaintiff should receive a sum equal to 45% thereof; and that all disbursements in connection therewith were to be deducted from the said 55% to be retained by defendant.

SEVENTH: Plaintiff alleges that in pursuance of the said agreement and understanding, on the 30th day of March, 1911, plaintiff gave the said defendant an order for all of the aforesaid documents, memoranda, cipher codes, etc. then in the possession of one Solon B. Lilienstern, an attorney at law in the Borough of Manhattan, City of New York, of whom the said defendant was an office associate.

EIGHTH: That the defendant obtained all of the aforesaid evidence belonging to the plaintiff from the said Solon B. Lilienstern, and acting under and pursuant to the said agreement with the plaintiff, defendant submitted all of the aforesaid documents and memoranda so received, to the Department of Commerce and Labor of the United States; and on or about the 16th day of December, 1911, entered into an arrangement with the said Department of Commerce and Labor, for and on behalf of the plaintiff, as follows:

"WASHINGTON, December 16, 1911.

JESSE W. UPPERCU, Esq.,
135 Broadway,
New York, N. Y.

SIR:

The Department has had under advisement the proposition submitted by you for placing at

the disposal of the Government the information in your possession regarding alleged violations of the alien contract labor law by the Dwight Manufacturing Company of Chicopee, Mass. and Alabama City, Ala., and has decided to accept such proposition, as follows:

In the event of the final successful outcome of any civil prosecution which may be instituted against the Dwight Manufacturing Company, upon the basis of the evidence furnished by you, the Department will submit an estimate and recommend the appropriation for your benefit of a sum equaling one-half of the total fine or fines assessed by the court against the prosecuted company, such payment to be made in accordance with the terms of Section one of the Act approved October 19, 1888 (25 Stat. 556).

Respectfully,
(sgd.) CHARLES NAGEL,
Secretary."

FSL

NINTH: That thereafter such proceedings were had by the Government of the United States in the name of the United States, against the said Dwight Manufacturing Company, for the recovery of the said fines for the said violations of the said Alien Contract Labor Law, upon the information furnished by the aforesaid documents, memoranda and other evidence belonging to the plaintiff and delivered to defendant as aforesaid, that on or about the 22nd day of June, 1914, a settlement of said actions or proceedings was had between the United States and the said Dwight Manufacturing Company, whereby the said Dwight Manufacturing Company paid the sum of $50,000. in full discharge and acquittance thereof.

TENTH: That thereafter defendant, for and on behalf of plaintiff, on or about the 4th day of August, 1914, received from the Government of the United States the sum of $25,000. pursuant to the

said agreement hereinbefore set forth with the said Secretary of the Department of Commerce and Labor.

ELEVENTH: That the defendant has wholly failed, neglected and refused to pay over to the plaintiff a sum equal to 45% of the said recovery paid to defendant for this plaintiff, namely: the sum of $11,250. nor any part thereof, though duly demanded, but has wrongfully appropriated and converted the same to his own use, to plaintiff's damage in the sum of $11,250., with interest thereon from the 4th day of August, 1914.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Eleven thousand, two hundred and fifty and 00/100 ($11,250.00) Dollars, with interest thereon from the 4th day of August, 1914, together with the costs and disbursement of this action.

HENRY C. QUINBY,
Attorney for Plaintiff,
Office & P. O. Address,
165 Broadway,
Borough of Manhattan, New York City.

County of New York, ss.:

EMMANUEL M. PACHINAKIS, being duly sworn, says that he is the plaintiff in this action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Sgd) EMMANUEL M. PACHINAKIS.

Sworn to before me this
29th day of April, 1915.

GEO. B. READ,
Notary Public # 3294,
New York County.

Exhibit B.

SUPREME COURT, ROCKLAND COUNTY

GEORGE B. READ,
Plaintiff

AGAINST

JESSE W. UPPERCU,
Defendant

The plaintiff above named by Henry C. Quinby his attorney for his complaint respectfully shows:

FOR A THIRD CAUSE OF ACTION.

* * * * * *

ELEVENTH: That at all the times hereinafter mentioned the defendant was, and is, an attorney and counsellor at law duly licensed to practice in the courts of the State of New York.

TWELFTH: That at all the times hereinafter mentioned one William H. Garland was, and is, an attorney and counsellor at law, duly licensed to practice in the Courts of the State of Massachusetts.

THIRTEENTH: That at Boston, Mass., between the 15th day of January, 1912 and the 22nd day of June, 1914, the said William H. Garland, at the special instance and request of the said defendant, rendered professional services to the said defendant, who promised and agreed to pay therefor, which said services were of the reasonable value of the sum of $3750.00 and are more particularly set forth and de-

scribed in the schedule marked "C" hereto annexed and expressly made a part of this complaint.

FOURTEENTH: That no part of said sum has been paid, though duly demanded.

FIFTEENTH: That prior to the commencement of this action said William H. Garland duly assigned all of his right, title and interest in and to said claim against the defendant, to this plaintiff. That there is now due and owing from defendant, to plaintiff, on account thereof, the sum of $3750.00 with interest from the 22nd day of June, 1914.

WHEREFORE, Plaintiff demands judgment against the defendant in the sum of Fifteen hundred ($1500.00) Dollars, with interest thereon from the 1st day of July, 1911; in the sum of Five hundred ($500.00) Dollars, with interest thereon from, approximately, the 15th day of October, 1911; and in the sum of Thirty-seven hundred and fifty ($3750.00) Dollars, with interest thereon from the 22nd day of June, 1914, making in all the sum of Fifty seven hundred and fifty ($5750.00) Dollars; together with the costs and disbursements of this action.

HENRY C. QUINBY
Attorney for Plaintiff
Office & P. O. Address: 165 Broadway
Borough of Manhattan, New York City

Schedule C.

(attached to Garland's Complaint.)

BOSTON, MASS. Dec. 15, 1914

JESSE W. UPPERCU,
Monsey, N. Y. In account with
WILLIAM H. GARLAND

Statement of legal services rendered at the request of Mr. Uppercu in the matter of the prosecution of the case of United States *v.* Dwight Manufacturing Co. in which Mr. Uppercu was interested as an informer under agreement with the U. S. Department of Commerce and Labor dated Dec. 16, 1911.

1912		
Jan.	15	Examination of papers and documents received from Attorney General.
Feb.	8	Letter to Mr. Uppercu.
Mar.	6	Conference at Washington with officers of Department of Commerce and Labor and with Assistant Attorney General Harr in regard to preparation of pleadings and legal questions involved.
Mar.	7-23	Examination of law and adjudicated cases under Immigration Act. Preparation of plaintiff's declaration in 97 counts.
Mar.	11	Conference with Mr. Uppercu
Mar.	22	Letter to Mr. Uppercu
April	15	Defendant's demurrer to declaration filed in Court. Examination of demurrer
Apr.	22 } 25 }	Letters to Mr. Uppercu. Copy of defendant's demurrer sent to Mr. Uppercu
Apr.	30	Telegram and letter to Attorney General at request of Mr. Uppercu, suggesting employment of E. M. Pachinakis in investigation and preparation of facts and evidence for trial.

1912

May 2 Conference by telephone with Commissioner General of Immigration regarding employment of E. M. Pachinakis.

May 14 Preparing and filing petition for writ of protection for E. M. Pachinakis. Writ of protection issued as prayed for by Judge Colt. Notice sent to Charles F. Choate, Esq., defendant's attorney, of intention of plaintiff to take deposition of E. M. Pachinakis at Boston, on May 20, 1912. Notified Mr. Uppercu of taking of said deposition.

May 16 Conference with Mr. Uppercu and E. M. Pachinakis at Hotel Belmont, New York, regarding said deposition.

May 18 Long conference with Mr. Uppercu and Mr. Pachinakis at Boston in preparation for latter's deposition. Examination of papers and documents relating to same.

May 19 Long conference with Mr. Uppercu and Mr. Pachinakis at Boston in preparation for latter's deposition. Examination of papers relating to same.

May 20 Took deposition of Mr. Pachinakis at Boston upon oral interrogatories before Ewing W. Hamlen, Notary Public, counsel for defendant being present. All day.

May 21 Continued taking deposition of Mr. Pachinakis. Examination completed. All day.

May 22 Examination of deposition of Mr. Pachinakis as written up by Notary. Conference with Mr. Pachinakis.

July 22 Letter to Uppercu regarding application for commission to take deposition of Constantine M. Pachinakis at Smyrna, Turkey.

1912

July 23 to August 6. Preparation of twenty-five additional counts for amendment to plaintiff's declaration. Preparation of interrogatories to be propounded by plaintiff to Constantine M. Pachinakis.

Aug. 6 Motion to amend declaration by addition of twenty-five counts filed in Court. Interrogatories to Constantine M. Pachinakis filed in Court. Notice of filing of amendment to declaration and of interrogatores sent to defendant's attorney.

Aug. 19 Letter to Mr. Uppercu regarding interrogatories to C. M. Pachinakis and payment of expenses of E. M. Pachinakis.

Sep. 3 Letter to Mr. Uppercu acknowledging his letters of Aug. 23 and 27 relating to sending E. M. Pachinakis from Paris to Smyrna to confer with his brother C. M. Pachinakis regarding taking of latter's deposition.

Sep. 16 Letter to Mr. Uppercu notifying him of authority obtained from Attorney General to send E. M. Pachinakis from Paris to Smyrna.

Sep. 18 Letter to Mr. Uppercu in answer to his letter of Sep. 17 and further in reference to sending E. M. Pachinakis to Smyrna.

Oct.-Nov. Various conferences with defendant's attorney with reference to amendment to Plaintiff's declaration.

Nov. 9 Letter to Mr. Uppercu in answer to his letter of Nov. 8 regarding proposed deposition of C. M. Pachinakis.

1912

Nov. 14 and 15 Long and full conference at Washington with officers of Department of Commerce and Labor and Attorney General regarding prosecution of case.

Nov. 19 Letter to Mr. Uppercu in answer to his letter of Nov. 15 and reporting conference with officials at Washington on Nov. 14 and 15.

Nov. 25 Letter to Mr. Uppercu answering his letter of Nov. 22 and making appointment for conference with him at Boston Nov. 29. Letter to defendant's attorney regarding amendment to plaintiff's declaration.

Nov. 29 Conference with Mr. Uppercu at Boston.

1913

Jan. 4 Letter to Mr. Uppercu answering his letter of Jan. 3 and advising him that defendant's attorney has agreed to prepare for argument of defendant's demurrer soon after Jan 6, and that plaintiff's brief is in preparation.

Jan. 18 Letter to Mr. Uppercu in answer to his letter of Jan. 17 regarding preparation for trial.

Jan. 24 Letter to Mr. Uppercu in answer to his letter of Jan. 23 advising him that demurrer will be argued within a week. Conference with defendant's attorney and application to Judge Dodge for assignment for hearing of demurrer.

Jan. 25 Letter to Mr. Uppercu in answer to his letter of Jan. 24 and notifying him that demurrer has been assigned for argument Feb. 1 before Judge Dodge.

1913

Jan. 31 Long conference with Mr. Uppercu at Boston and discussion of brief and argument for plaintiff on demurrer to amended declaration.

Feb. 1 Long argument on defendant's demurrer to plaintiff's amended declaration. Brief (17 pages) filed in behalf of plaintiff. Conference with Mr. Uppercu.

Feb. 8 Telephone conversation with Mr. Uppercu.

Feb. 11 Long conference with Mr. Uppercu at Boston in reference to advisability of application for leave further to amend plaintiff's declaration.

Feb. 7–14 Preparing further amendment to plaintiff's declaration.

Feb. 14 Letter to Mr. Uppercu in answer to his letter of February 13 and transmitting copy of count of proposed amended declaration. Notice sent Mr. Choate, defendant's attorney, of proposed new amendment to plaintiff's declaration. Conference with Judge Dodge regarding proposed amendment. Proposed amendment presented to Clerk of U. S. District Court and received.

Feb. 14– Mar. 4. Preparing brief in support of motion to be allowed to file amended declaration.

Mar. 4 Long argument on plaintiff's motion to file amended declaration. Brief (12 pages) filed in behalf of plaintiff's motion.

Mar. 4–8 Preparing supplemental brief and long affidavit in support of amended declaration.

1913

Mar. 8 Affidavit (9 pages) and supplemental brief (10 pages) filed in Court. Letter to Mr. Uppercu in answer to his letter of Mar. 4 as to law regarding use of deposition in case; advising that Judge Dodge has taken allowance of amended declaration under advisement.

Mar. 31 Letter to Mr. Uppercu advising him that Judge Dodge has allowed plaintiff's motion to file amended declaration.

Apr. 7 Letter to Mr. Uppercu advising him that case probably cannot be tried before summer vacation.

Apr. 17 Letter to Mr. Uppercu.

Apr. 21 Letter to Mr. Uppercu transmitting a copy of Judge Dodge's opinion on plaintiff's motion to be allowed to file amended declaration.

Apr. 23 Letter to Mr. Uppercu acknowledging his letter of Apr. 21.

May 4 Conference with Mr. Uppercu in New York.

May 27 Letter to Mr. Uppercu transmitting copy of supplemental brief on demurrer to plaintiff's amended declaration.

June 14 Letter to Mr. Uppercu in answer to his letter of May 29 in reference to remittance to be made by him to E. M. Pachinakis at Paris for trip to Smyrna.

June 23 Letter to Mr. Uppercu acknowledging his letter of June 21 advising that he has remitted to Mr. Pachinakis.

July 22 Letter to Mr. Uppercu acknowledging receipt of his letter of July 21 and enclosing copy of letter of Mr. Harr, Ass't Attorney General.

1913

Aug. 1 Letter to Mr. Uppercu in answer to his letter of July 30, and advising him that Judge Dodge still has demurrer under advisement, etc.

Aug. 4 Letter to Mr. Uppercu in answer to his letter of Aug. 2 and advising that a letter to Mr. Pachinakis at Paris has been returned unclaimed.

Sept. 15 Letter to Mr. Uppercu reporting conversation with Mrs. Pachinakis in Paris in regard to whereabouts of her husband, and advising that demurrer is still undecided by Judge.

Oct. 3 Letter to Mr. Uppercu answering his letter of Oct. 1 in reference to expense account and vouchers of Mr. Pachinakis.

Oct. 24 Letter to Mr. Uppercu acknowledging his letters of Oct. 14 and 23 relating to delay of Judge Dodge in deciding demurrer, etc., and reporting interview with Judge.

Nov. 6 Letter to Mr. Uppercu answering his letter of Nov. 5 in reference to payment of expenses of Mr. Pachinakis.

Nov. 19 Letter to Mr. Uppercu answering his letter of Nov. 17 in reference to mode of payment of Pachinakis expense, and advising him that Judge Dodge has rendered decision overruling defendant's demurrer as to 97 counts and decisions on certain motions, etc.

Nov. 25 Letter to Mr. Uppercu answering his letter of Nov. 24 and enclosing copy of opinion of Judge Dodge.

Nov. 28 Letter to Mr. Uppercu answering his letter of Nov. 25 and discussing question as to filing bill of exceptions on

1913

Judge's decision as to 25 counts: advising that defendant has presented bill of exceptions to overruling of demurrer on 97 counts of declaration.

Dec. 1 Telegram to Mr. Uppercu as to check in payment Pachinakis expense account.

Dec 4 Letter to Mr. Uppercu explaining delay in payment of check for Pachinakis expense account.

Dec. 24 Letter to Mr. Uppercu answering his letter of Dec. 23 regarding further steps necessary to procure payment to Mr. Uppercu of money advanced to Pachinakis, and advising that Mr. Garland has resigned his office as Assistant United States Attorney to take effect Jan. 1, 1914.

1914

Jan. 1 to June 22. Services rendered in accordance with written agreement between Mr. Uppercu and firm of Tyler, Corneau & Eames of Boston paid for by Mr. Uppercu Aug. 19, 1914. See bill rendered July 20, 1914.

Exhibit C.

(Letter head of United States Attorney.)

BOSTON, March 2, 1914

J. W. UPPERCU, Esq.,
115 Broadway,
New York, N. Y.

DEAR MR. UPPERCU:

I have just received yours of February 28th. The same mail also brought me a letter from the Attorney General dated February 20th, which must

have wandered somewhat before it reached me, insisting on the Department's previously expressed view that R. S. 1047 applies to a suit like that of United States *v.* Dwight Manufacturing Company, and that the Government is therefore barred against bringing a new action. I am sorry that they have reached this conclusion, but I am of course bound by their instructions.

I am, with regard,
Faithfully yours
WM. H. GARLAND,
Special Assistant to the
Attorney General.

Exhibit D.

(Letter head of Tyler, Corneau & Eames.)

BOSTON, April 28, 1914

DEAR MR. UPPERCU:

Your letter of the 24th. The enemy's latest is the filing of motions to suppress all our depositions on the grounds that the notaries' certificates are defective in certain trivial respects. In view of Shutter Thompson 15 Wall and No. Pac. Ry. Co. Uhlin 158 U. S. I have not the slightest anxiety as to the result of the hearing which is to be at 4 P. M. Apr. 30th before "ould" Dodge, *J.* I wish I could get away from him once in a while, but he is assigned to the motion list. He has not yet rendered a decision on the pleas in bar. I have made arrangements to take the deposition beginning Thursday of L. A. Anmann, Agent, and F. H. Norton, Cashier, of the Chicopee mill; and when these are finished, returned and filed, my preparations for trial will be complete. Choate is fighting for delay. He told me yesterday he did not see how the case could be tried this Spring, as it

would take four to six weeks, and he is assigned to argue the U. Shoe Mach'y case June 2nd. That argument will take a week. I don't believe the Dwight Case will take more than two weeks and I shall press for trial to my utmost. However, the Dist. Court is one week behind schedule, and the list seems strong. If it holds up, we might not be reached till the last of May, in which event the Court might continue the case until Sept. in view of Choate's assignment in the U. S. M. case. I should greatly dislike to have this happen and shall do my utmost to prevent it.

Do not labor under the misapprehension that Dodge will preside at the trial. Morton has charge of the jury trials, and he is no respecter of persons. Furthermore, he and I were in college together, members of the same social club, and our relations have always been pleasant and friendly. I am certain to get a square deal from him. I will keep you fully informed of developments. If I should come to N. Y. will let you know, and should be most happy to meet you and your Son, as you suggest. With cordial regards to you both, I am

Faithfully yours,

WM. H. GARLAND.

JESSE W. UPPERCU, Esq.

Exhibit E.

SPRINGFIELD, MASSACHUSETTS, June 29, 1914

DEAR MR. UPPERCU:—

I was very glad to receive your letters of the 29th and 28th with full information of your doings.

It looks as though Lilienstern was going to be your devoted friend from now on. I wonder if he has informed E. M. P. of the outcome of the

case. Zizinia being dead, no claim, I take it, will come from that quarter.

I hope you will succeed in getting your bill through at this session. If you don't, I fear you will have a lot of bother with L. and P. I am sorry you couldn't get the item in the Sundry Civil, but the Urgent Deficiency will do just as well no doubt. It would be a shame if the matter had to go over for another year. I think you are wise in your resolulution to stay on the job until you either get the appropriation made, or know positively that it can't be done this year.

I came up here this afternoon, and return tomorrow. Have started suit against administrators of an estate for mismanagement, by their intestate of the affairs of the Knox Automobile Co. which went into bankruptcy about a year ago.

I wrote the Atty General today at his request giving him a statement in detail of my services as Special Ass't in the Dwight case in order that he may fix my compensation. When that has been done, we shall be able to figure on your share. I find I worked on 51 days or parts of days since Feb. 10, 1914.

Wishing you great success, and with cordial regards, I am

Faithfully yours,
WM. H. GARLAND

JESSE W. UPPERCU, Esq.

SUPREME COURT, U. S.
FILED
DEC 6 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 14 ORIGINAL.

EX PARTE JESSE W. LUPERCIO, *Petitioner.*

BRIEF FOR PETITIONER.

ALVIN CUSHING COX,

Counsel for Petitioner.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 14 ORIGINAL.

EX PARTE JESSE W. UPPERCU, PETITIONER.

BRIEF FOR PETITIONER.

The petitioner, an attorney and counsellor at law, by this application for writ of mandamus, seeks to vacate or override the order of the United States District Court for the District of Massachusetts sealing the testimony and documents and court records in the case of the United States against the Dwight Manufacturing Company. He has shown a legitimate interest therein, to wit, a desire to introduce parts of that testimony and those records as evidence in his defense in two litigations pending against him in the Supreme Court of the State of New York.

His petition, with the exhibits attached, discloses that after he had been of substantial assistance to the Government as informant and in the prosecution of the Government's claim for penalties against the Dwight Manufacturing Company and had been paid by the Government in recognition of those services a substantial sum, he is now being subjected to two apparently unjust lawsuits. In the one, E.

M. Pachinakis, the joint violator of the law with the Dwight Company who turned state's evidence, seeks, in derogation of public policy, upon allegation that the petitioner, while acting as informant, was his agent, to compel the petitioner to pay to him a substantial part of the reward paid by the Government for the successful prosecution of his own crime; by the second, W. H. Garland, the Assistant United States Attorney, formerly in charge of the Dwight litigation, after full service payment by the Government, seeks to recover additional compensation for those same services from the petitioner.

After filing of the respondent's answer in this proceeding, the allegation stands conceded that the deposition of Pachinakis will disclose, if the petitioner is given access thereto, that he has sworn in the Dwight litigation that he had no financial interest such as he now claims. The answer of the respondent does not deny, and hence admits, that the services for which payment is now asked of the petitioner by the ex-Assistant United States Attorney will be shown by the sealed court records in the Dwight litigation, to have been services rendered to the Government, and that in addition they are now being overvalued.

In view of the brevity of the petition and the answer, we will not review the facts. No reason is given in the answer why the petitioner is not entitled or should not have the right to use as evidence court records and depositions. The respondent does submit to the Court the question as to whether the pendency of an appeal taken by the Government from an order denying its motion to vacate the ensealing order should cause a denial of this application. This proposition can hardly be entertained seriously. The petitioner, while having a legitimate interest in the records in the case of the United States against the Dwight Manufacturing Company, was not a party thereto, and his applica-

tion for access to the records was denied upon the ground that he had no standing in Court (Petition, paragraph VI; Answer, paragraph 3). The petitioner would hardly be able to satisfy the Court in which he is now being sued that he was making proper effort to get the necessary records for his defense if he contented himself with awaiting action taken by the Government in a proceeding where he can not be heard. Moreover, the issue there presented is somewhat different. The Government's attempt to open the records to the extent of permitting the petitioner here to have access to them might be denied because the Government admits it does not wish to open the records for its own purposes, and the denial might be placed upon the precise ground that it was the duty of the petitioner to apply for a writ of mandamus in order that the Court could properly grant him direct relief. But these things are refinements. The substantial fact is that petitioner is properly before this Court upon a meritorious application, and his necessities require immediate relief.

An examination of the answer discloses no reason whatever for the attitude of the District Judge nor any justification for his rulings. It is the bare statement that the Judge has refused and continues to refuse the petitioner access to court records because one of the parties thereto, the Dwight Company, is opposed, and that for undisclosed reasons. In one minor point the answer strengthens the petition,—while the petition and court records show that the Court sealed the deposition of Pachinakis and other papers, on its own motion and with the recital that both parties consented, the respondent in his answer affirmatively states that the former Assistant District Attorney in charge for the Government, William H. Garland, and Mr. Choate, counsel for the defendant, Dwight Manufacturing Company, both asked to have

the records sealed (Answer, paragraph 2). The interest of Mr. Garland in having these records sealed as a precaution against subsequent defense of his own and Pachinakis' claims (now being jointly conducted, Petition, §§ VI, VIII), has been pointed out in the petition. The fact that the Government has withdrawn its approval of Mr. Garland's act and by affirmative action has shown itself desirous of assisting the petitioner in his request is disclosed by the petition and answer alike, so that we are relegated to the interesting but by no means conclusive fact that counsel for the Dwight Company opposed and still opposes the opening of the court records. At the time for making a statement of sufficient reason to justify such unusual procedure, his reticence is unassailable.

The application should be granted upon well-settled principles of law.

The Writ of Mandamus is the proper remedy.

In re WINN, 213 U. S. 458;
In re POLLITZ, 206 U. S. 331;
In re GROSSMAYER, 177 U. S. 48;
In re HOHORST, 150 U. S. 653.

We have examined with considerable patience the law covering the right of inspection to public or court records involved in this proceeding. Through Federal and State decisions alike, run a concession of the right of any person, showing a legitimate interest, to have access to public records and particularly to court records. In fact, we have been unable to find any decision in any court which denies that right. Many of the decisions are not founded upon similar situations, but a reading of all the cases is persuasive proof that such records are inherently public and that, subject to reasonable regu-

lations, any person showing a legitimate interest (and this is liberally construed) has the common-law right of full disclosure.

In SLOAN FILTER CO. *v.* EL PASO REDUCTION CO., 117 Fed. Rep. 504, the matter is perhaps most squarely presented of any case.

In an action involving the validity of a patent, a large volume of testimony was taken for and against the patent. Thereupon the parties settled the action and sought to withdraw the testimony from the files. Upon the opposition of an outside party having an interest in the determination of the validity of the patent, the Circuit Court declined to permit such records to be withdrawn, using language which is pertinent here:

> "No statute is required, however, to support the petitioner's application. He is clearly within the common law rule as one who has an interest in the subject and therefore a right to inspect public documents affecting his interest. The petitioner is not an intermeddler in other people's affairs, nor is its application against public policy, as was the case in *re* CASWELL R. R., 29 Atlantic, 259. Petitioner seeks only to protect itself in respect to the matter in controversy in this cause and for that purpose it may rightfully invoke the aid of the law to obtain a copy of the testimony and documents on file."

The public character of Federal records is quite clearly disclosed by Section 2, Chapter 729, of the United States Revised Statutes, at page 1889. There it is provided:

> "That the clerks of the several courts of the United States shall prepare and keep in their respective offices, complete and convenient indices and cross-indices, with the judgment records of said Court, and such indices and records shall at all times be open to the examination and inspection of the public."

Again, Section 828 of the Revised Statutes, provides:

> "All books in the offices of the clerks and Circuit and District Courts, containing the docket or minute of the judgments or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same without any fees or charge therefor."

The Supreme Court in the case of BELL *v.* COMMONWEALTH TITLE COMPANY, 189 U. S., page 131, construed these sections to grant to a title company the right of access to the Court records to assist it in its work of insuring titles.

It would seem reasonably deducible that if the Federal courts are required to have its judgments and decrees indexed and cross-indexed for the convenience of the public in examining, that parties having a legitimate interest in those proceedings prior to the entry of final judgment are entitled to access thereto.

In this particular instance, the deposition of Emmanuel Pachinakis, which has become material in the New York State litigation, was testimony taken in a public court, filed at the time in the clerk's office as a public record, and the subsequent sealing of that public record destroys the public character of that court and its records in this particular, and does so in this instance without any motive of public policy, or in fact any other reason inducing it to so act.

The decisions in this point are collated in the note appended to BELL against the COMMONWEALTH TITLE INSURANCE COMPANY, 110 Federal Reporter, 828, (affirmed *supra*, 189 U. S. 131). The Court will observe that some decisions have prevented title companies from bodily copying the records for speculative purposes, but that they were reversed by the Bell case in this court; that indiscriminate

newspaper notoriety can perhaps be checked, but that in no other instance where no principle of public policy is involved has any court attempted to limit any member of the public from examining court records. In this instance, the deposition of Emmanuel Pachinakis was theoretically taken in open court, and there it belongs.

If the writ of mandamus is refused in this instance, it will substantially enunciate the rule that ordinary court trials can be had in secret and the public or those interested excluded at the instance of a party litigant or the whim of the trial Judge. Such a rule would be repugnant to the principles upon which our courts are founded and justice administered, and would establish a dangerous precedent.

There is no question of fact involved, and the writ should issue.

Respectfully submitted,

ALVIN CUSHING CASS,
Counsel for Petitioner.

16

Office Supreme Court, U. S.
FILED
NOV 29 1915
JAMES D. MAHER
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 14 Original.

EX PARTE JESSE W. UPPERCU,

Petitioner for Mandamus.

ANSWER OF FREDERIC DODGE, UNITED STATES CIRCUIT JUDGE.

CHARLES F. CHOATE, Jr.,
FRANK W. KNOWLTON,
Counsel.

L. E. Lane, Law Printer, 201 High Street, Boston.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 14 Original.

EX PARTE JESSE W. UPPERCU,
PETITIONER FOR MANDAMUS.

ANSWER OF FREDERIC DODGE, UNITED STATES CIRCUIT JUDGE.

Frederic Dodge, now and since September 10, 1912, a Circuit Judge for the First Judicial Circuit, and sitting during said period in the District Court for the District of Massachusetts by designation, appearing in compliance with the rule to show cause why the prayer of the petition above referred to should not be granted, said rule having been issued October 18, 1915, and a certified copy thereof served upon him on November 16, 1915; hereby represents as follows:—

1. Said respondent admits that on June 22, 1914, he made an order, believed to be the order quoted in paragraph II of said petition but not with entire correctness, in a suit then pending in said District Court and numbered 254 on its law docket, wherein the United States was plaintiff and the Dwight Manufacturing Company defendant; which is believed to be the suit referred to in said paragraph. A copy of said order is hereto annexed and marked "A". On the same day judgment for the plaintiff was entered and satisfaction of said judgment acknowledged.

2. Said order was made by the respondent upon the oral request of both parties to the suit, William H. Garland, special assistant to the Attorney General, appearing for the United States and Charles F. Choate, Jr., appearing for the Dwight Manufacturing Company, both

said attorneys being counsel of record in said case. Both counsel were at the time before the respondent to present for his approval, with reasons therefor, a written agreement for judgment and judgment satisfied in compromise and settlement of said case, and that agreement was approved by the respondent and entered of record in accordance with the provisions of Section 27 of the Act of February 20, 1907, as amended, entitled "An Act to Regulate Immigration of Aliens into the United States". At that time the parties were at issue and the case was ripe for trial, but actual trial of said case had not been started and no evidence had been presented.

3. Thereafter, on February 10, 1915, a motion purporting to be in the same case was filed by counsel on behalf of Jesse W. Uppercu, the present petitioner, a copy whereof is annexed, marked "B". Said Uppercu was not at the time and could not have been a party in said case. The United States District Attorney assented to this motion, but the defendant refused its assent and opposed the motion. This motion was orally denied by the respondent February 15, 1915. The order denying it is believed to be the order referred to in paragraph IV of the petition.

4. Thereafter on March 8, 1915, another motion in the same case was made by George W. Anderson, who had succeeded, since June 22, 1914, to the office of United States District Attorney for Massachusetts, a copy whereof is annexed marked "C". This motion, opposed by the defendant, was also denied on March 8, 1915, by the respondent. Thereafter, on April 15, 1915, another motion in the same case was made by or on behalf of the same United States District Attorney for Massachusetts, a copy whereof is annexed marked "D". This motion, also opposed by the defendant, was also denied by said respondent, who filed, on April 23, 1915, a memorandum of opinion setting forth his grounds for said denial, a copy whereof is annexed marked "E". The latter of the two above motions made by or on behalf of the then United States District Attorney for Massachusetts is believed to be the one referred to in paragraph XII of the petition. Upon May 14, 1915, the United States District Attorney presented seasonably to the respondent and filed a bill of exceptions to said order of April 23, 1915, denying the said motion filed April 15,

1915. Said bill of exceptions was presented for allowance and allowed upon October 19, 1915, and a petition for a writ of error was filed by the United States District Attorney upon October 19, 1915. A citation upon said petition for a writ of error was issued on October 19, 1915, returnable November 18, 1915, and said return date has been extended by agreement to December 2, 1915.

5. No appeal has been claimed from or exceptions filed to the denial of the petitioner's motion filed February 10, 1915, nor from or to the denial of the motion by said United States District Attorney filed March 8, 1915, and the time for claiming such appeals or bills of exceptions has expired.

6. The remaining allegations of said petition not covered by what has been above stated relate to matters regarding which the respondent has no personal knowledge and with which he believes himself to be in no way concerned. He therefore neither admits nor denies any of them.

7. The respondent submits to the court the question whether, pending the petition for a writ of error above referred to, the action taken by him in denying the above motions, or any of them, can afford ground for the issue of the writ prayed for.

8. Upon the foregoing statement of the action taken by him upon said motions and the circumstances under which it was taken, the respondent submits the same to the judgment of this court, and is ready to take such further action relative thereto as the court may direct.

FREDERIC DODGE,
U. S. Circuit Judge.

CHARLES F. CHOATE, Jr.,
FRANK W. KNOWLTON,
Counsel.

EXHIBIT A.

DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

No. 254, Law Docket.

UNITED STATES OF AMERICA,

v.

DWIGHT MANUFACTURING COMPANY.

ORDER FOR SEALING DEPOSITIONS AND IMPOUNDING EXHIBITS.

June 22, 1914.

DODGE, J. It is Hereby Ordered, both parties consenting, that all depositions herein be sealed by the clerk and retained in the files of his office, subject to the right of either party to inspect the same, and that all exhibits in this case be impounded with the clerk, subject to the same right of either party to inspect them.

By the Court,

CHARLES K. DARLING, Clerk.

A true copy,

[SEAL] Attest: WILLIAM NELSON, *Clerk.*

[Ten cent stamp — documentary, Internal Revenue — cancelled.]

EXHIBIT B.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 254.

UNITED STATES

v.

DWIGHT MANUFACTURING COMPANY.

MOTION TO INSPECT &c. DEPOSITION OF EMANUEL M. PACHINAKIS.

(Filed February 10, 1915.)

And now comes Fred Joy, Esq., attorney for Jesse W. Uppercue and respectfully asks this Honorable Court that he may inspect the deposition of Emanuel M. Pachinakis, filed in the above cause which deposition was impounded and ordered sealed by this court June 22, 1914, and that the Clerk of this Court may certify to extracts therefrom pertaining to the interest of said Pachinakis in that litigation.

FRED JOY

Feby 8, 1915.

The United States hereby assents to this motion.

G. W. ANDERSON, U. S. Attorney.

A true copy,

[SEAL] Attest: WILLIAM NELSON, *Clerk.*

[Ten cent stamp — documentary, Internal Revenue — cancelled.]

EXHIBIT C.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 254, Law.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

DWIGHT MANUFACTURING COMPANY, DEFENDANT.

MOTION OF UNITED STATES TO VACATE ORDER OF JUNE 22, 1914, FOR SEALING DEPOSITIONS, ETC.

(Filed March 8, 1915.)

And now comes the United States by its Attorney, George W. Anderson, and moves the Court that the order made herein under date of June 22d, 1914, so far as said order requires depositions taken in said proceedings by or in behalf of the United States to be sealed by the Clerk and retained, be vacated. Or in the alternative that said order be so modified as to permit the examination of such depositions or any part thereof, by or in behalf of any party desiring to use said depositions or extracts therefrom as evidence in any case pending or to pend in any State or Federal Court in the United States of America.

G. W. ANDERSON, U. S. Atty.

March 8, 1915.

(Endorsement)

254 Law. United States v. Dwight Mfg. Co.

Motion of United States to Vacate Order of June 22, 1914, for Sealing Depositions, Etc.

March 8, 1915. Motion denied.

Frederic Dodge, U. S. Circ. J.

U. S. District Court, Mass. Dist.
Mar 8 1915.
Filed in Clerk's Office.

A true copy,

[SEAL] Attest: WILLIAM NELSON, *Clerk.*

[Ten cent stamp — documentary, Internal Revenue — cancelled.]

EXHIBIT D.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

UNITED STATES
v.
DWIGHT MANUFACTURING COMPANY.

MOTION.

And now comes the United States by its attorney, George W. Anderson, and represents to the court that on February 8th, 1915, a motion herein was made by Fred Joy, assented to by the United States, and denied by the court, as appears by the record, copy of which is hereto annexed marked "A". That on March 8th, 1915, a motion in said cause was made by the United States through its attorney, George W. Anderson and denied by the court as appears by the record attached hereto marked "B". That at the hearings on said motions, no evidence was taken or affidavits filed. That certain informal statements made by counsel were, for the purpose of determining said motion, taken to be true. That on preparation of the record for appeal to the Circuit Court of Appeals, it appears that the facts or alleged facts then before the court were not understood in the same way by the court and by counsel, and that there is therefore good ground to believe that in one or both denials of said motions, the court acted inadvertently.

Wherefore the United States now moves the court that the order made in the above entitled cause under date of June 22, 1914, in so far as said order requires depositions taken in said cause by or in behalf of the United States to be sealed by the clerk and retained, be vacated, or that such other proper modification of said order may be made as to permit the use of said depositions or extracts therefrom, as evidence in any case pending or to pend in any State or Federal Court of the United States of America.

The United States further moves for leave to file herewith as material facts in support of this motion, the affidavit of Fred Joy.

UNITED STATES,
By G. W. Anderson, United States Attorney.

April 15, 1915.

I, Fred Joy of Winchester, Massachusetts, on oath depose and say that I am a member of the Bar of Massachusetts and that one Jesse W. Uppercue of New York City is a client of mine. That litigation is now pending against the said Uppercue in the Courts of New York, brought by one Emanuel M. Pachinakis, seeking to recover certain moneys from Uppercue said to have accrued to said Uppercue through the litigation of the *United States* v. *Dwight Manufacturing Company,* being case No. 254 on the Civil Docket of the United States District Court for the District of Massachusetts.

That the deposition of said Pachinakis was taken in said suit, and that certain statements made by Pachinakis in said deposition are material and necessary evidence to be adduced in said litigation now pending in New York in order that said court may ascertain the actual truth for the purpose of doing justice between party and party.

That examination of the record in said suit of the *United States* v. *Dwight Manufacturing Company* discloses that on June 22, 1914, the following record was made as to sealing and impounding said deposition: —

"District Court of the United States
District of Massachusetts.
No. 254, Law Docket.
United States of America
v.
Dwight Manufacturing Co.

Order for Sealing Depositions and Impounding Exhibits.
June 22, 1914.

Dodge, Judge. It is hereby ordered both parties consenting that all depositions herein be sealed by the clerk and retained in the files of his office subject to the right of either party to inspect the same and that all exhibits in this case be impounded with the clerk subject to the same right of either party to inspect same.

By the Court,
Charles K. Darling, Clerk."

That application has been made by me to the Court for access to said deposition for the purpose of obtaining the necessary evidence to use in said suit and said application was denied.

That thereupon, application was made by me to the present United States Attorney for his intercession to obtain access to said deposition

and said United States Attorney assented to the motion, and a copy is hereto annexed marked "A". But the Court declined to grant said motion on the ground, as I understood, that I was not a party in said cause. Thereupon and in consequence of said action, the United States Attorney made a motion in behalf of the United States, copy of which is hereto annexed marked "B" and said motion was denied, as I am informed and believe, on the ground that the assent of the Defendant's Counsel was a necessary condition to its allowance either as a matter of right or as a matter of proper discretion.

That the result is, that the said Uppercue is now without remedy to obtain access to said deposition of said Pachinakis now within the custody and control of this Court, which access is or may be necessary for the proper ascertainment of the actual facts and to enable a full and proper trial in said cause or in some other suit for the same alleged cause of action.

FRED JOY.

Subscribed and sworn to this fifteenth day of April, A. D. 1915.

Before me,

(NOTARIAL SEAL) Roger Clapp, Notary Public.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 254.

UNITED STATES

v.

DWIGHT MANUFACTURING COMPANY.

MOTION.

And now comes Fred Joy, Esq., Attorney for Jesse W. Uppercue and respectfully asks this Honorable Court that he may inspect the deposition of Emanuel M. Pachinakis, filed in the above cause which deposition was impounded and ordered sealed by this Court June 22, 1914, and that the Clerk of this Court may certify to extracts therefrom pertaining to the interest of said Pachinakis in that litigation.

FRED JOY.

February 8, 1915.

The United States hereby assents to this motion.

G. W. ANDERSON, U. S. Atty.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

UNITED STATES OF AMERICA, PLAINTIFF,
v.
DWIGHT MANUFACTURING COMPANY, DEFENDANT.

MOTION.

And now comes the United States by its Attorney, George W. Anderson, and moves the Court that the order made herein under date of June 22, 1914, so far as said order requires depositions taken in said proceedings by or in behalf of the United States to be sealed by the Clerk and retained, be vacated. Or in the alternative that said order be so modified as to permit the examination of such depositions or any part thereof, by or in behalf of any party desiring to use said depositions or extracts therefrom as evidence in any case pending or to pend in any State or Federal Court in the United States of America.

G. W. ANDERSON, U. S. Atty.

March 8, 1915.

A true copy,
[SEAL] Attest: WILLIAM NELSON, *Clerk.*

[Ten cent stamp — documentary, Internal Revenue — cancelled.]

EXHIBIT E.

DISTRICT COURT OF THE UNITED STATES.
DISTRICT OF MASSACHUSETTS.

No. 254, Law.

UNITED STATES
v.
DWIGHT MANUFACTURING COMPANY.

ON MOTION OF THE UNITED STATES FILED APRIL 15, 1915.

OPINION.

(April 23, 1915.)

DODGE, J. The order of June 22, 1914, to which this motion refers, that all depositions in the above case be sealed by the clerk, was made, as the order recites, upon the consent of both the parties, who were the only parties in the case. I do not think it should be vacated or

modified without the consent of both said parties. The defendant objects to its being vacated or modified and opposes the present motion as it opposed the motions to the same effect heretofore made, one by Mr. Joy, filed February 10 and heard February 15, 1915; the other by the United States, filed March 8 and heard on the same day. I find nothing sufficient to change the view I have previously taken of the matter, and am therefore obliged to deny the present motion, upon the grounds above indicated, which are the grounds upon which the previous motions were denied.

A true copy,

[SEAL] Attest: WILLIAM NELSON, *Clerk.*

[Ten cent stamp — documentary, Internal Revenue — cancelled.]

Office Supreme Court, U. S.
FILED
DEC 6 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 14 Original.

EX PARTE JESSE W. UPPERCU,

Petitioner for Mandamus.

BRIEF FOR RESPONDENT.

CHARLES F. CHOATE, JR.,
FRANK W. KNOWLTON,
JAMES GARFIELD,
Counsel for Respondent.

L. H. Laws, Law Printer, 101 High Street, Boston.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 14 Original.

EX PARTE JESSE W. UPPERCU,
PETITIONER FOR MANDAMUS.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

This is a proceding seeking to obtain for the petitioner the vacating or modification of an order entered by the respondent in an action at law properly pending before him while sitting by designation in the District Court for the District of Massachusetts. The present petitioner was not a party to the original action and, so far as the record of the suit discloses, had no interest in its outcome.

The original action was brought by the United States to recover for itself from the Dwight Manufacturing Company certain penalties for alleged violations of the "Alien Contract Labor Law". While the action was pending certain depositions "de bene esse" were taken by the United States, among them being the deposition of one Emmanuel M. Pachinakis. Subsequently, while the parties were at issue and before any evidence was introduced or trial begun, the parties entered into an agreement for a compromise of the action and, upon good

grounds shown, the respondent approved the agreement, and on June 22, 1914, an entry of judgment and judgment satisfied was made upon the records of the court. On the same day, and in connection with the agreement of compromise, both counsel, a Special Assistant to the Attorney General appearing for the United States and an attorney of record appearing for the defendant, jointly requested the respondent to enter the order complained of and in compliance with that request, the respondent entered the following order: —

> "Dodge, J. It is Hereby Ordered, both parties consenting, that all depositions herein be sealed by the clerk and retained in the files of his office, subject to the right of either party to inspect the same, and that all exhibits in this case be impounded with the clerk, subject to the same right of either party to inspect them. By the Court,
>
> CHARLES K. DARLING, *Clerk.*"

Subsequent to the final record ending the action at law, the United States, by virtue of a private agreement set forth in the present petition, paid a portion of the sum recovered in the original action to the petitioner. He then appears, from the recitals of his petition, to have been subjected to suits by the witness in the original action, Pachinakis, and the then assistant United States District Attorney, and certain private collateral agreements as to the disposition of the money have apparently been claimed against him. To prove that a witness, Pachinakis, offered in the original action by the United States, falsified, either in his testimony taken by the deposition "de bene esse" or in his claim against the petitioner, the latter sought to obtain an extract from the said deposition which had been sealed by order of the court above referred to. It does not appear that any

effort has been made by him to obtain, by a proper commission and subpoena, the evidence of the notary or of any of those present when the original testimony was taken. Instead the petitioner filed, on February 10, 1915, under the title of the original action, a motion that he be allowed to inspect the deposition and obtain duly attested extracts from it. The United States District Attorney, a new incumbent to that office since final judgment in the original action, assented to the motion, but the defendant opposed it and, upon a hearing, the motion was denied by the respondent. No steps were taken to perfect an appeal or writ of error from this action of the court.

On March 8, 1915, the then United States District Attorney filed a motion that the order of June 22, 1914, be vacated or in the alternative modified to permit use of the depositions as evidence in other cases. The Special Assistant to the Attorney General who appeared in and conducted the original action to final judgment and requested the order complained of, and the former District Attorney did not join in this motion and it was opposed by the defendant. This motion was denied and no steps were taken by the United States to perfect an appeal or writ of error from this action of the court.

On April 15, 1915, the same United States District Attorney filed another motion, more at length but to the same purport as his earlier motion, and offered an affidavit of the attorney of the present petitioner, in support of the motion. The facts and reasons stated in that affidavit are in substance the same facts and reasons set forth more at length in the present petition. This motion and affidavit are annexed to the respondent's answer and marked "Exhibit D". The defendant opposed it and after a hearing the respondent entered, on April 23, 1915, the following opinion:—

"DODGE, J. The order of June 22, 1914, to which this motion refers, that all depositions in the above case be sealed by the clerk, was made, as the order recites, upon the consent of both the parties, who were the only parties in the case. I do not think it should be vacated or modified without the consent of both said parties. The defendant objects to its being vacated or modified and opposes the present motion as it opposed the motions to the same effect heretofore made, one by Mr. Joy, filed February 10 and heard February 15, 1915; the other by the United States, filed March 8 and heard on the same day. I find nothing sufficient to change the view I have previously taken of the matter, and am therefore obliged to deny the present motion, upon the grounds above indicated, which are the grounds upon which the previous motions were denied."

After the denial of this motion, the United States took the proper steps to appeal from the action of the court and on October 19, 1915, seasonably and properly filed a petition for a writ of error upon which a citation, returnable December 2, 1915, was issued. This petition for a writ of error is now pending, has never been withdrawn or dismissed and is in proper form to obtain a review of the action of the respondent in denying the motion aimed to give the petitioner the relief he now seeks.

ARGUMENTS AND AUTHORITIES.

I. MANDAMUS IS NOT THE PROPER REMEDY OF THE PETITIONER.

A. It is a well settled rule that a writ of mandamus will never be granted where there is another adequate legal remedy open to the petitioner. It cannot be used, for example, to perform the functions of an appeal or a writ of error.

Ex parte Roe, 234 U. S. 70 (1914).
Ex parte Harding, 219 U. S. 363 (1911).
In re Pollitz, 206 U. S. 323 (1907).
Chandler v. *Circuit Judge*, 97 Mich. 621 (1893).

In the case at bar the petitioner had another adequate legal remedy in his own name in the form of an appeal or a writ of error from the denial of his motion of February 10, 1915. He has not claimed such appeal or writ of error, and the time for making such claim has now expired. It is obvious that his own neglect to make use of one remedy cannot give him a right to another remedy to which he would not otherwise have been entitled. The case of —

Sloan Filter Co. v. *El Paso Reduction Co.*, 117 Fed. Rep. 504 (Colo. 1902),

cited in the petition, decides that one who is not a party to a suit may, nevertheless, intervene in it to prevent exactly the sort of order that the petitioner is here seeking to have vacated, if he has sufficient interest in the subject-matter of the suit. If, however, it should be urged that the present case is distinguishable on the ground that the petitioner has no such interest in the subject-matter as had the petitioner in the Sloan case, it is respectfully submitted that on that construction the present petitioner has no such interest in the subject-matter as to entitle him

to inspect the depositions which the court has ordered sealed, and that he has, therefore, no standing in this Court to obtain a writ of mandamus to be allowed such inspection.

Furthermore, the petition for a writ of error now pending in the Circuit Court of Appeals of the United States for the First Circuit on behalf of the United States based upon the denial of the Government's motion of April 15, 1915, is actually and admittedly for the benefit of the present petitioner, and if it is allowed he will thereby obtain the relief which he seeks to obtain by this petition. The motion of April 15, 1915, recited the previous unsuccessful attempt of the petitioner to obtain a modification of the order of the court of June 22, 1914, and in support offered a lengthy affidavit of the present petitioner's attorney alleging as grounds for the relief there sought substantially all that the petitioner now offers as the reason for seeking his present remedy.

Clearly, therefore, the Government's writ of error now pending in its suit against the Dwight Manufacturing Company affords an adequate legal remedy to the petitioner.

B. A writ of mandamus can never be used to control the judicial discretion of a subordinate court.

Ex parte Roe (*supra*).
In re Winn, 213 U. S. 458, 468 (1909) (*semble*).

Though mandamus may be used under appropriate circumstances, to compel a court to decide an issue, it cannot be used to dictate how such issue shall be decided. Consequently, it cannot compel the reviewing or vacating of a judgment, decree or order already made, on the ground that the issue was wrongly decided.

Ex parte Morgan, 114 U. S. 174 (1884).
Ex parte Schwab, 8 Otto, 240 (1878).

Ex parte Loring, 4 Otto, 418 (1877).
Chiera v. *Circuit Judge*, 97 Mich. 638 (1893).

"The act of a court suppressing or refusing to suppress a deposition, being judicial, will not be controlled" by mandamus. (26 Cyc. Law and Procedure, 205.)

Ex parte Elson, 25 Ala. 72 (1854).

The making of the order ensealing the depositions in the case of *United States* v. *The Dwight Manufacturing Co.* was an act within the discretion of the court. The denial of the motion was a judicial act, and that it was intended as an exercise of discretion rather than a ruling as a matter of right is apparent from the following language in the respondent's opinion of April 23, 1915, denying the Government's motion of April 15, 1915, to vacate said order: —

"The order of June 22, 1914, to which this motion refers, that all depositions in the above case be sealed by the clerk, was made, as the order recites, upon the consent of both parties, who were the only parties in the case. I do not think it *should* be vacated or modified without the consent of both said parties. . . . I find nothing sufficient to change the view I have previously taken of the matter. . . ." (Italics ours.)

C. A writ of mandamus will never be granted unless the petitioner has a clear and specific right to be enforced by it.

In re Key, 189 U. S. 84 (1903).
Ex parte Cutting, 4 Otto, 14 (1877).

1. In the case at bar, petitioner has no absolute or clear right to examine the depositions ensealed by the court.

Petitioner has no such interest in the subject-matter of the case of *United States* v. *The Dwight Manufacturing Co.* as to give him an absolute right to examine records ensealed by the court with the consent of both parties.

(*a*) He was not a party to the original suit, nor to the agreement for ensealing the depositions.

(*b*) His interest in the subject-matter of the original suit was confined, by his own showing, to his claim against the United States for a contingent remuneration if the suit was successful. Having received such remuneration he has ceased to have any interest whatever in the subject-matter of the original suit.

2. Any right which petitioner may have had to examine the records in question, short of an absolute right, was suspended by the ensealing order made by Judge Dodge on June 22, 1914.

II. DEPOSITIONS DIFFER FROM OTHER PUBLIC DOCUMENTS WHICH ARE REQUIRED TO BE OPEN TO THE INSPECTION OF ALL.

A. "A deposition is no part of the record, but is a separate statement by a person not a party to the cause."

Wigmore on Evidence, § 2111 (3).
Myers v. *Roberts,* 35 Fla. 255 (1895).

A deposition, even if used in evidence, is not part of the record of the litigation in which it is filed in the sense in which the writ, pleadings, interlocutory orders, verdict and judgment are parts of the record. It is not part of the record on appeal unless expressly incorporated in it. It does not come within the requirements of the Federal Statute (R. S. § 828) which provides that—

"all books in the offices of the clerks of the district courts, containing the docket or minutes of the judgments or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same".

By implication this statute would seem to provide that other papers in the clerk's offices were not subject to this absolute right of inspection.

Re McLean (9 Cent. Law. J. 425, Fed. Cas. No. 2719 (U.S. Cir. Ct., O., 1879)).

The custody of depositions is given to the clerk, not because they are part of the record of the case, but simply to insure the safeguarding of the documents and to preserve their integrity until offered as evidence in the case.

B. A Federal Statute (R.S. § 865) provides that the magistrate taking a deposition "de bene esse" for use in a Federal court shall keep it until it is delivered by him to the court, or that it shall be by him "sealed up and directed to such court, and remain under his seal till opened in court". There are similar statutes in several States. The Rules of the Federal District Court for the District of Massachusetts (Rule No. 13) provide that—

"no deposition returned, under seal to the clerk's office, in any suit at common law, shall be opened unless by the consent of the parties in writing certified, or by order of a judge of the court".

Where a deposition is opened out of court contrary to this provision, it becomes inadmissible as evidence.

Beale v. *Thompson,* 8 Cranch, 70 (1814).

C. A deposition, if suppressed or excluded, loses all

evidential value. Its existence as an instrument of evidence is conditional upon its being admitted in evidence.

Gross v. *Coffey,* 111 Ala. 468, 474 (1895).
House v. *Camp,* 32 Ala. 541, 549 (1858).
Moore v. *McCullough,* 6 Mo. 444 (1840).
Weeks, Law of Depositions, § 365.

III. A Court has Power in its Discretion to Suppress a Deposition.

The public has no absolute right to inspect a deposition which has been filed in court, whether it has been opened or not. Depositions are always treated, within the limits of their statutory existence, as being entirely within the control of the court.

A. A court has power and discretion to suppress depositions: —

(1) For irregularities in the taking or return.
Dunkle v. *Worcester,* 8 Fed. Cas. No. 4162 (1869).

(2) For containing scandalous matter.
In re Caswell, 29 Atl. 259 (R. I. 1893).

B. A court can exclude a deposition, or parts thereof, when offered as evidence at a trial. This is true, in the case of certain defects, even if no objection was made to the deposition or to the question or answer at the time of taking the deposition (*e.g.*, if the facts stated are immaterial or irrelevant, or if the witness is no longer unavailable.) (See R. S. § 865.) Objections made at the time of taking the deposition are rather in the nature of notices to the other party than objections to evidence, as the Commissioner who takes the deposition ordinarily has no power to exclude answers. A deposition "de bene esse" is therefore in fact as well as in name merely conditionally part

of the case. In addition to the possibility of its exclusion under the ordinary rules of evidence, a deposition may be shown to be invalid by extrinsic evidence offered at the trial.

C. Even after a deposition has been opened it may still be suppressed, excluded, or temporarily withdrawn from the files. Consequently, as the court has discretion to order it to be opened before trial, there appears to be no reason why the court should not have discretion to reconsider such order and to order it sealed up again. The foregoing analogies would seem to point to the conclusion that, within reasonable limits protecting the rights of the parties to obtain the benefits of proper depositions in the action in which they are taken, such documents are within the control of the court. A disposition of them by an order of the court, assented to by all parties to the litigation in which they are taken, is clearly within the wise discretionary control of the court over matters properly committed to it.

Respectfully submitted,

CHARLES F. CHOATE, JR.,
FRANK W. KNOWLTON,
JAMES GARFIELD,
Counsel for Respondent.